IN THE

Supreme Court of the United States

October Term, 1976
No. 76-930

DIXY LEE RAY, Governor of the State of Washington, *et al.*,

Appellants,

vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the Western District of Washington

Brief of the State of California, Joined by the States of Alaska, Georgia, Hawaii, Missouri, Pennsylvania and Wisconsin, as Amici Curiae in Support of Appellants

EVELLE J. YOUNGER,
Attorney General,
E. CLEMENT SHUTE, JR.,
Assistant Attorney General,
C. FOSTER KNIGHT,
Deputy Attorney General,
110 West "A" Street, Suite 600,
San Diego, Calif. 92101,
(714) 236-7349,
Attorneys for Amicus Curiae State of California.

[Attorneys for Amici Curiae States of Alaska, Georgia, Hawaii, Missouri, Pennsylvania and Wisconsin, listed on next page.]

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

STATE OF ALASKA:
AVRUM M. GROSS, *Attorney General,*
SANFORD SAGALKIN, *Assistant Attorney General,*
Department of Law,
Pouch K,
Juneau, Alaska 99811,
(907) 465-3600.

STATE OF GEORGIA:
ARTHUR K. BOLTON, *Attorney General,*
ANN ESTES, *Staff Assistant Attorney General,*
216 State Judicial Building,
Atlanta, Georgia 30334,
(414) 656-3339.

STATE OF HAWAII:
RONALD Y. AMEMIYA, *Attorney General,*
LAURENCE K. LAU, *Deputy Attorney General,*
Department of the Attorney General,
Hawaii State Capitol,
Honolulu, Hawaii 96813,
(808) 548-4740.

STATE OF MISSOURI:
JOHN ASHCROFT, *Attorney General,*
ROBERT M. LINDHOLM, *Assistant Attorney General,*
Department of Justice,
Supreme Court Building,
Jefferson City, Missouri 65101,
(314) 751-3321.

COMMONWEALTH OF PENNSYLVANIA:
ROBERT P. KANE, *Attorney General,*
WILLIAM EICHBAUM, *Assistant Attorney General,*
Department of Environmental Resources,
101 South Second Street,
P.O. Box 2357,
Harrisburg, Pennsylvania 17120,
(717) 787-4488.

STATE OF WISCONSIN:
BRONSON C. LaFOLLETTE, *Attorney General,*
THEODORE PRIEBE, *Assistant Attorney General,*
Department of Justice,
114 East State Capitol,
Madison, Wisconsin 53702,
(608) 266-0432.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Page

Miscellaneous

Regulations

Statutes

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-930

DIXY LEE RAY, Governor of the State of Washington, *et al.*,

Appellants,

vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the Western District of Washington

Brief of the State of California, Joined by the States of Alaska, Georgia, Hawaii, Missouri, Pennsylvania and Wisconsin, as Amici Curiae in Support of Appellants

Interest of Amici Curiae

The States filing this brief are vitally concerned with the outcome of this case. At stake is the historic police power authority of coastal states to impose reasonable regulations to protect environmentally sensitive estuarine waters from supertanker oil pollution.[1]

[1]The State of Missouri, joining this brief, is not a coastal or Great Lakes state but is concerned about the adverse implications of the District Court's decision below on federal-state relations, especially in the area of police power regulation to protect the state's environmental quality. The States of Georgia, Hawaii, Pennsylvania and Wisconsin are coastal or Great Lakes states and are also concerned that their historic police powers over ship-to-shore pollution have been drastically curtailed by the District Court's opinion below.

The States of Alaska and California are particularly affected. With the advent of Alaskan oil, it has become clear that Alaska must assume the environmental burden of transporting by oil tanker, and the other Pacific Coast states—particularly California—must assume the environmental burden of receiving and passing inland through their coastal regions a significant portion of the nation's oil needs. Within the next several years, it is expected that 1.2 million barrels per day of Alaskan oil will be entering California via tanker. This amount will increase as the Alaskan outer Continental Shelf is explored, developed and put into production. Not only the higher volume of crude oil shipped but also the increasing size of super-tankers presents a growing potential for catastrophic oil spills that will cause serious damage to the coastal resources and marine environment of California, Alaska and other Pacific Coast states. California has 1,100 miles of coastal shoreline with innumerable bays, estuaries, coastal salt marshes and a rich and varied marine environment. These coastal marine resources comprise a priceless asset to California and the nation—not only in terms of natural beauty but also in terms of the tourism and fishing industry dollars that depend on the protection of the marine environment from major oil spills.

Alaska has over 33,000 miles of coastal shoreline. Alaska's coastal waters, including those above the outer Continental shelf, support one of the largest domestic and international fisheries in the world. To a substantial degree, Alaska's economy depends on the continuation of its fisheries. Alaska's coastal lands also contain this country's last and finest wildlife and wilderness assets. Alaska's future economy will also depend on

the ever-growing national demand for recreation and wilderness opportunities in these coastal lands. Alaska's coastal waters and coastal lands are a priceless treasure to Alaska and to the nation.

Several major tanker oil spills have occurred in the bays and estuaries of amici states. Coastal states have a vital interest in assuring that the highest available standards of safety in tanker design and traffic operation are adopted and implemented. The states filing this brief have no interest or desire to compete with the U.S. Coast Guard in regulating vessel safety and design and traffic control. However, where Congress has legislated requirements for tanker safety and for protecting coastal marine environments in a way that plainly permits cooperative and complementary regulation by coastal states, such coastal states have a compelling interest in implementing their historic police powers in a manner not inconsistent or in conflict with federal regulations in this area. Since the regulation of oil tankers to protect marine environments involves difficult economic, social and environmental policy choices, the states also have a vital interest in protecting their freedom to make these policy choices wherever such choices can be made without creating actual conflicts with the existing federal regulatory scheme or frustrating federal objectives.[2]

---

[2]Like the State of Washington, Alaska has adopted legislation regulating oil tanker operations to minimize disastrous oil spills and to encourage—but not mandate—higher vessel design and equipment standards than currently required by the Coast Guard. Alaska Tank Vessel Traffic Regulation Act, AS 30.20.010 *et seq.* (1976) California is considering the adoption of similar legislation not in conflict with federal law. California Senate Bill 841 introduced April 6, 1977, by Senator Sieroty.

Introduction

The State of Washington has adopted a law (Chapter 125, Laws of the State of Washington § 88.16.170 *et seq.* (hereafter Chapter 125) regulating supertanker operations in Puget Sound for the purposes of preventing oil spills that can cause long term damage to the estuary's unique marine environment.

The intent and purposes of Chapter 125 are set out in the first section:

> "Because of the danger of spills, the legislature finds that the transportation of crude oil and refined petroleum products by tankers on Puget Sound and adjacent waters *creates a great potential hazard to important natural resources of the state and to jobs and incomes dependent on these resources.*
>
> The legislature also recognizes Puget Sound and adjacent waters are a *relatively confined salt water environment with irregular shorelines and therefore there is a greater than usual likelihood of long-term damage from any large oil spill.*
>
> The legislature further recognizes that certain areas of Puget Sound and adjacent waters *have limited space for maneuvering* a large oil tanker and that these waters contain *many natural navigational obstacles as well as a high density of commercial and pleasure boat traffic.*
>
> For these reasons, it is important that large oil tankers be piloted by highly skilled persons who are familiar with local waters and that such tankers have sufficient capability for rapid maneuvering responses.

> It is therefore the intent and purpose of RCW 88.16.180 and 88.16.190 *to decrease the likelihood of oil spills on Puget Sound and its shorelines* by requiring all oil tankers above a certain size to employ Washington state licensed pilots and, *if lacking certain safety and maneuvering capability requirements, to be escorted by a tug or tugs while navigating on certain areas of Puget Sound and adjacent waters.*" Chapter 125, 1975 Laws of the State of Washington, § 88.16.170. (Emphasis added.)

There are three severable components to Chapter 125.

First, in Section 3(1)[§ 88.16.190(1)], all oil tankers between 40,000 dwt and 125,000 dwt are permitted entry into Puget Sound only if:

(1) the oil tanker is in ballast (i.e., not carrying oil);

(2) the oil tanker is escorted by a tug or tugs having an aggregate shaft horsepower equivalent to 5% of the tanker's deadweight tonnage; or, *in the alternative,* if

(3) the oil tanker possesses the following standard safety features:

- a. Shaft horsepower in the ratio of one horsepower for each 2½ deadweight tons, and
- b. twin screws, and
- c. double bottoms underneath all oil and liquid cargo compartments, and
- d. two radars in working order and in operation, one of which must be collision avoidance radar, and

e. such other navigational position location systems as may be prescribed by the Board of Pilot Commissioners.

Second, oil tankers larger than 125,000 dwt are prohibited from entering Puget Sound.

Third, in Section 2 [§ 88.16.180], all oil tankers including "enrolled" vessels between 50,000 dwt and 125,000 dwt are required by Chapter 125 to take on a Washington State licensed pilot while navigating Puget Sound and adjacent waters.[3] Oil tankers smaller than 40,000 dwt are exempted from the requirements of Chapter 125.

At the outset, it is important to clarify what Chapter 125 is *not*. It is not a state law prohibiting entry of supertankers over 125,000 dwt into all state waters. It carefully limits the prohibition to the ecologically-sensitive area of Puget Sound. It bears emphasizing that in January 1975 the Oceanographic Commission of Washington reported on three different places west of Puget Sound (hence not subject to Chapter 125) which the Commission considered reasonably developable as port sites capable of receiving supertankers larger than 125,000 dwt. Pretrial Order, ¶ 107. Chapter

[3]The validity of the pilotage requirement is not addressed by this brief other than to summarize our view that states clearly may require State-licensed pilots on foreign and American vessels under register for foreign trade which enter state coastal waters. 46 U.S.C. § 211. It has recently been held that Congress granted the states the right to require state-licensed pilots on registered vessels "to promote navigational safety and to protect the environmental integrity of their coastlines (e.g., from oil spills caused by tankers running aground). . . ." *Warner v. Dunlap*, 532 F.2d 767, 772 (1976). Amici curiae states here contend that any portion of Washington's pilotage reuirement deemed by this Court to be in conflict with 46 U.S.C. §§ 215, 364, is severable from the remaining valid provisions under the express severability section in Chapter 125.

125 also does not limit the development of deepwater ports offshore the Pacific Coast of Washington which would be capable of accommodating the world's largest supertankers. Indeed, Chapter 125's exclusion of larger tankers from the ecologically-sensitive Puget Sound is in furtherance of the intent and policy of Congress in enacting the Deepwater Port Act of 1974 to encourage the construction of deepwater ports for transferring oil and gas well offshore and to keep tankers away from our crowded inshore ports where the risk of environmental damage is greatest.[4]

Chapter 125 is also *not* a state law imposing design or equipment safety standards on vessels. Chapter 125 clearly permits tankers within the 40,000-125,000 dwt range to enter Puget Sound without having double bottoms, twin screws, collision avoidance radar or the shaft horsepower requirements which Chapter 125 sets out as alternatives to entry without tug escort assistance. Chapter 125's reference to vessel design (e.g., double bottoms) and equipment safety (e.g., collision avoidance radar) are legislative expressions of what the State of Washington would like to see voluntarily accomplished by new tanker construction proposed for use in Puget Sound and legislative expressions of how the State of Washington would like to see the federal statutory mandate for new tanker design and vessel equipment safety (in the Ports and Waterways Safety Act of 1972)[5] [hereafter "PWSA"] be implemented

[4]P.L. 93-627; 33 U.S.C. § 1501; Senate Report No. 93-1217; 93rd Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News 7534, 7538, 7590, 7614; Conference Report No. 93-1605, 93rd Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News, 7624.

[5]P.L. No. 92-340, 33 U.S.C. § 1221 (Title I) and 46 U.S.C. § 391a (Title II).

by the Coast Guard with respect to the ecologically-sensitive needs of Puget Sound.

Chapter 125 is also not a state law aimed at protecting local economic interests nor does it impose undue burdens on interstate commerce disproportionate to the strong state interest in protecting the unique marine environment in Puget Sound under its historic police powers. Amici curiae emphasize that every port, harbor, bay and estuary throughout the world is unique in terms of its physical and ecological carrying capacity. A state police power regulation that imposes reasonable limits to protect that carrying capacity—even where incidental burdens on commerce result—is not invalid.

The District Court's opinion below holds that the federal Ports and Waterways Safety Act (PWSA) preempts the entire field of oil tanker regulation including vessel operations, traffic routes, pilotage, safety design and tugboat escorts. According to the District Court, the states may not regulate any aspect of this field under their historic police powers and also do not share with the federal government any of the regulatory authority over oil tankers enabled and mandated by the PWSA. This is a sweeping opinion which has suddenly removed from the states a great deal of their historically recognized police powers over coastal and harbor water uses for the protection of public health, safety, welfare and marine environmental quality.

It bears emphasizing that this is not a case involving questionable state interests. The state interests at stake here—the protection of Puget Sound from disastrous oil spills—are of a very high magnitude. Protecting the environmental quality of Puget Sound is essential to the continuing viability of the commercial fishing,

tourism and other recreation-based economies of northwest Washington. A majority of the state's residents live near Puget Sound. In these respects, the interests at stake touch on fundamental elements of the state's sovereignty.

The District Court's opinion below misreads Congressional intent in adopting the PWSA and blithely assumes that the existence of extensive federal legislation in the field and certain national or even international aspects of oil tanker regulation—by themselves—constitute a complete federal occupation of the field, without room for any complementary state regulation. This is a sharp departure from previous rulings by this Court involving the preemption doctrine. The District Court in effect presumed preemption without analyzing whether actual conflicts exist between the federal and state statutes, without analyzing whether the state statute frustrates federal purposes in the PWSA and without according a presumption of validity to the state statute which is designed to protect important state interests in the areas of environmental quality, public health and safety.

The District Court's decision is clearly overbroad and must be reversed.

Summary of Argument

The Ports and Waterways Safety Act (PWSA) does not preempt Chapter 125 of the Laws of the State of Washington, § 88.16.170 et seq. (hereafter Chapter 125). Chapter 125 is designed to protect Puget Sound from catastrophic oil spills caused by supertankers. This is a regulation based on the state's historic police powers to protect public health, safety and marine

environmental quality. Where, as in this case, the state interests to be protected are significant, Chapter 125 is presumptively valid unless it can be demonstrated clearly and unmistakably that Congress intended through the PWSA to occupy the entire field of oil tanker regulation, completely excluding complementary state regulation. In this case, the terms of Titles I and II of the PWSA do not expressly preempt the entire field of oil tanker regulation. The PWSA and its legislative history also fail to demonstrate any clear, unmistakable Congressional intent that oil tanker regulation to protect marine environmental quality be exclusively federal.

The subject matter of regulating oil tankers to protect environmentally sensitive bays, harbors, inland waterways and shorelines does not inherently require nationwide uniformity or federal primacy. While some elements of oil tanker regulation may be uniformly prescribed (e.g., vessel design standards), most elements of regulation are highly dependent on the unique features and conditions present in each bay, harbor or operating area (e.g. vessel traffic routes). The District Court's opinion below, in ruling exclusive federal control over the subject matter, ignores these realities and prevents the states from innovating and participating in a cooperative regulatory process, in an area that traditionally has been subject to state police power.

Nor is Chapter 125 preempted on the basis of actual conflicts with the PWSA and its implementing Coast Guard regulations. The provision in Chapter 125 banning supertankers over 125,000 dwt is fully compatible with the Coast Guard's existing Vessel Traffic System regulations for Puget Sound. The Coast Guard regulations do not by themselves license operation of supertankers in Puget Sound; rather they are limited to requirements for vessel position reporting, communications and control over vessel movements. Vessel size is not a factor in the Coast Guard regulations. The optional design and equipment/tug escort provisions in Chapter 125 also present no actual conflicts with existing Coast Guard regulations or the PWSA. The Coast Guard has not issued any regulations governing tug escorts in Puget Sound and oil tankers can comply with the Coast Guard Vessel Traffic System rules while also complying with the tugboat escort requirements of Chapter 125. The design and equipment provisions in Chapter 125 are clearly optional—they represent Washington's preference not its mandate for oil tanker design.

Chapter 125 does not frustrate any federal purposes in the PWSA or related federal legislation. The supertanker ban provision is fully consistent with federal policy in the Deepwater Port Act, encouraging the very large tankers to stay out of confined, inland waters like Puget Sound. The design and equipment preference provisions in Chapter 125 do not frustrate federal purposes since, to the extent that the Coast Guard has not yet acted to mandate the same or more stringent design and equipment requirements, any oil tankers voluntarily constructed to meet Washington's preferences will comply with the Coast Guard's minimum standards and will be anticipating what the federal government may soon require.

Chapter 125 also does not violate the Commerce Clause of the United States Constitution. First, the State of Washington's interest in protecting marine environmental quality in Puget Sound is of a high magni-

tude. Second, any economic burdens on interstate transportation of oil, caused by Chapter 125's tug escort and supertanker ban are very small. Compliance with Chapter 125's provisions by Appellees and other oil companies has not caused any reduction in the amount of oil processed at Puget Sound refineries. In cases such as this, where a state exercises its historic police powers in a reasonable way to protect public health, safety and marine environmental quality, the state regulatory action has been upheld even where (unlike this case) there is a material interference with interstate commerce.

ARGUMENT

I

Chapter 125 Is Not Preempted by the Ports and Waterways Safety Act

In cases such as this, where the subject matter that Congress is claimed to have preempted has been traditionally regulated by the states, this Court has always started with ". . . the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In determining whether Congress has unmistakably ordained exclusive federal regulation in the field, this Court has looked at the federal statute's language, its legislative history and the statute's implicit structure and purpose. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Where the federal statute does not expressly preempt the subject matter, this Court's decisions have analyzed the federal and state statutory schemes to determine if the state statute actually conflicts with the federal law, meaning that a state regulatory exercise in the same field would be "absolutely and totally contradictory and repugnant" with the federal statutory scheme. *Goldstein v. California*, 412 U.S. 546, 553 (1973). This Court has also looked to see if the subject of the regulation reveals an inherent need for nationwide uniformity and federal primacy. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 297, 319-20 (1851). However, this Court has reiterated its view that "the exercise of federal supremacy is not lightly to be presumed."

New York State Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973). Where strong state interests—such as the prevention of oil pollution in coastal waters—are at stake, *Askew v. American Waterways Operators*, 411 U.S. 325, 343 (1973), or where coordinate state and federal efforts co-exist in pursuit of common purposes, *New York, etc. v. Dublino, supra*, at 421, this Court has expressed its

> "conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973), quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Applying these principles to the facts in this case, it will be evident that Chapter 125 of the Laws of the State of Washington, § 88.16.170 et seq. is a valid exercise of the State's police power, not in conflict with nor preempted by the Ports and Waterways Safety Act.

A. Titles I and II of the Ports and Waterways Safety Act Do Not Expressly Preempt Chapter 125

Where Congress has intended a complete ouster of State regulation in a given field, it has not been hesitant in clearly saying so. For example, in the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 *et seq.*, Congress expressly preempted the field of adopting and enforcing new car emission standards to prevent air pollution:

> "§ *1857f-6A State Standards*
>
> (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard

> relating to the control of emissions from new motor vehicle engines to this part. No state shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new vehicle engine as a condition precedent to the initial retail sale, titling (if any) or registration . . . ."

There is no provision in Title I or II comparable to the clear legislative expression of preemption in the Clean Air Act Amendments of 1970 which we have referenced.

The PWSA contains only one reference to State standards. In Title I (33 U.S.C. § 1222(b)) relating to "prevention of damage to vessels, bridges, and other structures" and "*protection of navigable waters from environmental harm*" (emphasis added), Congress said:

> "*Authority under other provisions and better Safety requirements prescribed by other agencies unaffected.*"
>
> (b) Nothing contained in this chapter supplants or modifies any treaty or Federal statute or authority granted thereunder, *nor does it prevent a State or political subdivision thereof from prescribing for structures only higher safety equipment requirements or safety standards than those which may be prescribed pursuant to this chapter.*" (Emphasis added.)

Appellees argue that Title I's savings clause for more stringent state standards is "for structures only" and that this constitutes an express federal preemption of state regulations over "vessels". But this is a savings clause and not a provision for express preemption. The plain meaning of this savings clause is to allow

the states to impose higher or more stringent safety equipment requirements or safety standards—in a relatively narrow field, "for structures only"—than any existing Coast Guard regulations on the same subject. The savings clause does not prevent the states from exercising their traditional regulatory authority over vessel operations in harbors, bays, and inland waters, where the Coast Guard has not yet acted to regulate. There is an important distinction between federal legislation prohibiting the states from taking any regulatory action at all in a particular field (even where the federal agency has not acted), and prohibiting the states from taking regulatory action governing a specific subject only after the federal agency has acted to regulate that specific subject. Absent express language prohibiting the states from taking any regulatory action at all over vessel operations, preemption would have to be presumed from the statutory language or legislative history. But as this Court recently said:

> "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

In *Dublino, supra*, this Court noted that twenty-one states had adopted Aid to Families with Dependent Children programs at the time of the federal statute's (Work Incentive Program or WIN) enactment; thus,

any Congressional intention to supersede existing state work rules "would in all likelihood have been expressed in direct and unambiguous language." *New York, etc. v. Dublino, supra*, 414. Similarly, given the fact that the Coastal and Great Lakes states, since their inception, have exercised police power authority over vessel operations in bays, harbors and other confined coastal waters (*see Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 328-329 (1973)), if Congress had intended through the PWSA a complete ouster of state regulatory authority it would have expressed its intention in the same kind of unequivocal terms that it used, for example, in the Clean Air Act Amendments of 1970 governing new car emission standards.

Appellees, however, cite legislative history on Title I's savings clause [33 U.S.C. § 1222(b)] in arguing that Congress intended to forbid any state regulation at all over vessel operations even where the Coast Guard had not acted to regulate. Appellees' *Motion to Affirm*, pages 11-12. Despite the existence of some statements in the legislative history arguably supporting Appellees' view, a review of the legislative history demonstrates at most a Congressional intent to preclude higher or more stringent state regulations over vessel equipment which, like navigation and communication equipment, require uniformity to avoid federal-state conflicts, *e.g.*, the radio frequency over which an oil tanker must communicate. See, *e.g., Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant*

Marine and Fisheries on H.R. 867, H.R. 3635, H.R. 8140, and H.R. 6232, 92nd Cong., 1st Sess. 141, No. 92-12 (1971); House Report on H.R. 8140, 92nd Cong., 1st Sess. 15, Report No. 92-563 (1971).[6]

The legislative history of Title I of the PWSA shows that it was intended to clarify the Coast Guard's authority to regulate port safety and, specifically, to establish and operate vessel traffic control systems as the Coast Guard deems appropriate. Prior to PWSA Title I's enactment in 1972, the Coast Guard's regulatory authority over vessel and port safety was based on the Tank Vessel Act of 1936, 49 Stats. 1889 [authority to issue regulations governing vessels carrying "combustible cargoes"] and on 46 U.S.C. § 170 [authority to regulate vessel transportation of explosives or dangerous substances including oil]. This latter enabling legislation expressly waived preemption as to local regulations ". . . not inconsistent or in conflict with this section . . . ." 46 U.S.C. § 170(7)(d). The Coast Guard also regulated port safety under the President's delegation of his authority to regulate the movement, inspection and guarding of vessels, harbors, ports and waterfront facilities upon the President's determination that national security required such regulation. Magnuson Act, 50 U.S.C. § 191. Both the Tank Vessel Act of 1936 and the Magnuson Act, while not waiving preemption, contain no language expressing or implying federal preemption of port safety. Even as Title I

[6]For example, in discussing the reason for adding the phrase "for structures only" to Title I's savings clause [33 U.S.C. § 1222(b)], the House Report pointed to the Coast Guard's testimony "...that it was their intention that higher *vessel equipment* regulations and standards by states should apply to structures only and not to vessels." *House Report, supra*, 15, No. 92-563 (1971) (emphasis added).

was adopted to clarify the Coast Guard's authority to regulate port safety (and obviate the need to rely on the questionable "national security" enabling provisions of the Magnuson Act), it was apparent that state and local regulations over port safety would continue to play an important role. For example, the Coast Guard Commandant testified that:

> "The primary concern for the safeguarding of waterfront facilities and vessels has been and continues to be a matter of local concern. This legislation will in no way affect that primary responsibility . . . *Local regulations would continue to set forth requirements to assure port, harbor, waterways and facility protection*" (emphasis added). *Hearings Before the Subcommittee on Coast Guard, Coast and Geodetic Survey and Navigation of the House Committee on Merchant Marine and Fisheries on H.R. 17830, H.R. 18047, H.R. 15710*, 91st Cong., 2d Sess. 17-18 (No. 91-34) (1970).

The legislative history of PWSA Title I, considered in the context of earlier Congressional enactments which either expressly waived preemption or were silent on preemption, simply fails to demonstrate a Congressional intent to preempt the entire field of oil tanker regulation.

The ambiguous legislative history on the extent and degree of Congressional intent to preempt the states under the PWSA is further obscured by Senator Warren Magnuson's statement commenting on the District Court's decision below:

> "As sponsor of that Act [the PWSA] in the Senate, I have made known my disagreement with

the decision. I think it is wrong; I feel the Court has simply misread the intent of Congress as contained in the Ports and Waterways Safety Act. The weakness of the decision is highlighted by the complete absence of any analysis of the terms of the Act. The Court's reasoning was simplistic at best. Preemption is not favored in the law. Congress must show a clear intent to preempt before such a finding is made. This Court summarily reached its decision on the thinnest of reasoning. I say they are wrong." 121 Cong. Rec. S. 17575 (daily ed., October 1, 1976).

Furthermore, the District Court's opinion below did not rely on language of express preemption in Title I or on Title I's legislative history to support its ruling that the entire field of oil tanker regulations is preempted by the PWSA.

In summary, Title I of the PWSA is enabling legislation, authorizing but not mandating the Coast Guard to establish and operate vessel traffic control systems as it deems appropriate. This is only a limited area in the broader field of oil tanker regulation and does not include Chapter 125's ban on supertankers over 125,000 dwt nor Chapter 125's tug escort requirement.

Title II of the PWSA, unlike the permissive Title I, mandates the Coast Guard to adopt minimum design and construction standards for oil tankers. Title II also contains no express language of preemption and, in fact, is silent on the authority of the states to regulate oil tanker design and construction.

Thus, neither Title I nor Title II of the PWSA contain express language preempting the states from regulating oil tanker operations in the absence of Coast

Guard regulations on the same specific subject. Nor does the legislative history of the PWSA unequivocally show a congressional intent to preempt the entire field of regulating oil tanker operations.

B. Congress Has Not Completely Occupied the Field of Regulating Oil Tanker Operations to the Exclusion of Compatible State Regulation

The principal basis for the District Court's opinion below holding Section 3 of Chapter 125 preempted by the PWSA, was the District Court's view that the PWSA establishes such a comprehensive federal scheme for regulating oil tankers that no room was left for any state regulation. The District Court pointed, for example, to the PWSA enabling authority in Title I, 33 U.S.C. § 1221(3)(iv), permitting the Coast Guard to require tugboat escorts and to restrict and even exclude tankers from Puget Sound under adverse or hazardous conditions. The fact that the Coast Guard has not yet acted to regulate these aspects of oil tanker operations seemed immaterial to the District Court because the comprehensiveness of the PWSA somehow demonstrates a Congressional intent to occupy the entire field without allowance for compatible State regulation. However, in *De Canas v. Bica,* 424 U.S. 351 (1976), this Court held that the comprehensive scope and level of detail in the federal Immigration and Nationality Act (INA) did not, in itself, preempt a state regulation prohibiting employees from knowingly hiring illegal aliens. This Court said:

> "The comprehensiveness of the INA scheme for regulation of immigration and naturalization. without more, cannot be said to draw in the employment of illegal aliens as 'plainly within

> . . . [that] central aim of federal regulation.'" *De Canas v. Bica, supra,* 359, quoting *San Diego Unions v. Garmon,* 359 U.S. 236, 244 (1959).

Similarly, in *New York State Dept. of Social Services v. Dublino,* 413 U.S. 405 (1973), the pervasiveness of the federal WIN work rules in the Social Security Act was said by this Court to be insufficient in itself to demonstrate a Congressional intent that the federal law was to be exclusive:

> "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . . ." *Dublino, supra,* 415.

The District Court erred in inferring a Congressional intent to preempt the entire field of oil tanker regulation based on the comprehensiveness of the PWSA. Given the complexity of the subject matter addressed by Congress in the PWSA, a detailed statutory scheme was both likely and appropriate—completely apart from any questions of preemptive intent.

C. The Regulation of Oil Tanker Operations Is Not a Subject That Is Inherently National or Requires Only One Uniform System

Related to its view that the very pervasiveness of the PWSA implies a Congressional intent to occupy the field of oil tanker regulation, the District Court's opinion below also rested its preemption holding on its view that the purpose of the Tank Vessel Act (PWSA Title I's predecessor) and Title II of the

PWSA ". . . was to establish a uniform set of regulations governing the types of ships permitted within the coastal waters of the United States and the conditions under which they would be permitted to operate. Balkanization of regulatory authority over this most interstate, even international, of transportation systems is foreclosed by the national policy embodied in the PWSA." *ARCO v. Evans,* .... F.Supp. ...., 9 ERC 1876, 1878; 7 E.L.R. 20071-20072 (1976). Arguing in the same direction, Appellees try to convey the impression that the subject of regulating oil tanker operations has long been an area of federal predominance.

However, there is nothing inherent in the subject of regulating oil tanker operations that requires national, uniform treatment. Rather, the regulation of oil tanker operations to prevent or minimize oil spills is highly dependent on unique and differing local navigational features, weather and traffic conditions and environmental quality in each bay, harbor and coastal waterway. What was said by this Court in upholding Louisiana's maritime quarantine regulations is also applicable to this case:

> "The matter is one in which rules that should govern it may in many respects be different in different localities, and for that reason may be better understood and more wisely established by local authorities. The practice which should control the quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York." *Morgan's Railroad and Steamship Co. v. Louisiana,* 118 U.S. 455, 465 (1885).

The uniqueness of each harbor and differing local needs respecting navigation are exactly the reasons for this Court's decision in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), holding that vessel pilotage was not a subject requiring nationally uniform rules. Since *Cooley*, innumerable cases have upheld the validity of state police power regulatory authority over various aspects of vessel operations, navigation and protection of marine environmental quality. *Packet Co. v. Catlettsburg*, 105 U.S. 599 (1882); *Morgan's Railroad and Steamship Co. v. Louisiana*, 118 U.S. 455 (1885); *Lawton v. Steele*, 152 U.S. 133 (1893); *Kelly v. Washington*, 302 U.S. 1 (1937); *Skiriotes v. Florida*, 313 U.S. 69 (1940); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

The PWSA and the Coast Guard regulations thereunder recognize that the regulation of oil tanker operations is not susceptible to national uniformity. Title I of the PWSA, for example, gives the Coast Guard discretionary authority to establish vessel size limits and operating conditions "in areas [the Coast Guard] determines to be especially hazardous or under conditions of reduced visibility, adverse weather, vessel congestion or other hazardous circumstances." 33 U.S.C. § 1221(3). Obviously, if the Coast Guard ever decides to exercise its authority in this limited area, its discretionary decision will be highly dependent on local conditions. Similarly, Title I provides that Coast Guard rulemaking over vessel operations ". . . shall, among other things, consider—

(1) The scope and degree of hazards;

(2) Vessel traffic characteristics . . .;

(3) Port and waterway configurations and the differences in geographic, climatic, and other conditions and circumstances;

(4) Environmental factors;

(5) Economic impacts and effects;

(6) Existing vessel traffic control systems, services and schemes; and

(7) Local practices and customs . . ." 33 U.S.C. § 1222(e).

Thus, Title I of the PWSA clearly recognizes that the diversity of local port and coastal waterway conditions will necessarily result in a diversity of tailor-made regulations over oil tanker operations rather than uniform, national rules.

Similarly, Title II of the PWSA and Coast Guard implementing regulations contemplate that the Coast Guard's "minimum" design and equipment safety standards for oil tankers are functionally dependent on diverse navigational conditions in harbors and waterways. For example, the Coast Guard explained its decision not to mandate double bottoms for oil tankers on a national basis, in part, because:

> "[T]he surrounding physical characteristics of a port area have a great deal to do with accident types to be anticipated. Where channels are wide and the water deep, collisions would be expected to dominate. Where water is shallow with respect to using vessels' drafts, groundings should be expected. There is a wide diversity of conditions encountered in U.S. ports and even with individual port areas." United States Coast Guard, *Final*

Environmental Impact Statement on Regulations for Tank Vessels Engaged in the Carriage of Oil in Domestic Trade 73 (August, 1975).

Nevertheless, the Coast Guard design regulations include double bottoms as one way new oil tankers can be constructed to minimize accidental oil spills.[7]

In summary, there is nothing inherently national about the subject matter of regulating oil tanker operations. Uniform national rules applicable to all oil tankers are not contemplated by the PWSA except in the limited area of setting minimum vessel equipment and design standards; however, even in this limited area, the Coast Guard recognizes that higher design standards may be necessary for certain areas. In any event, Section 3 of Chapter 125 does not mandate vessel design and equipment standards, nor does it frustrate the federal purposes of giving the Coast Guard the duty of initially setting minimum design standards.

D. Chapter 125 Does Not Present Actual Conflicts With the PWSA and Coast Guard Regulations Thereunder

In *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), the plaintiff vessel owners argued that Detroit's smoke abatement ordinance, as applied to ships, was preempted by a comprehensive system of regulation enacted by Congress to provide for vessel equipment (including boilers) inspection, approval and licensing. The argument was simply that if a vessel's boilers had been licensed by the comprehensive federal regulatory system, a city could not forbid the operation of such boilers. Noting that there was no actual conflict between the purpose of Detroit's smoke abatement ordi-

[7]See note 9, *infra* page 28.

nance (pollution control) and the purpose of the federal licensing program for ships boilers (safety), this Court upheld the validity of the Detroit ordinance saying that Congressional intent to preempt ". . . is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the state." *Huron, supra,* 443. *Accord, Askew v. American Waterways Operators,* 411 U.S. 325, 327 (1973).

Similarly, in this case, Sections 3(1) and 3(2) of Chapter 125 [the prohibition of oil tankers over 125,000 dwt from Puget Sound, and the Tug Escort requirement] are fully compatible and not in conflict with the federal purposes of the PWSA and Coast Guard regulations adopted thereunder.

Both Chapter 125 and the PWSA have the same purpose—to prevent or minimize accidental oil spills in order to protect marine environmental quality. Chapter 125 simply regulates oil tanker operations in specific ways not regulated by the Coast Guard. The Coast Guard has established and operates the Puget Sound Vessel Traffic System. 33 C.F.R., Part 161. But the Coast Guard's regulations are essentially limited to establishing communication rules, vessel movement reporting requirements, and vessel separation and traffic lanes. The Coast Guard's Puget Sound Vessel Traffic System neither authorizes entry of supertankers over 125,000 dwt into Puget Sound nor does it impose size limits of any kind on oil tankers.

There are only two references to vessel size in the PWSA: 1) the Coast Guard's permissive authority to control vessel traffic in areas it determines are "especially hazardous" by *inter alia* establishing vessel size limitations—33 U.S.C. § 1221(d)(iii); and 2) Congress's

directive to the Coast Guard that, in adopting vessel regulations, it shall consider various factors including "the sizes and types of vessels." 33 U.S.C. § 1222(e)(2). These statutory references to vessel size by their terms do not present a conflict with Chapter 125. The Coast Guard's regulations also do not impose tug escort requirements of any kind on oil tankers.[8] Chapter 125's tug escort/optional design requirements do not present any conflicts with the Coast Guard's vessel traffic lanes and separation zones. Rather, the tug escort/optional design requirements of Chapter 125 provide added protection against contingencies—loss of ship's power and maneuverability—which the Coast Guard traffic lane regulations do not address.

Chapter 125's optional vessel design and safety equipment standards also do not conflict with the PWSA and/or existing Coast Guard regulations:

First, they are optional, not mandatory. Even the most anciently designed federally licensed tankers can come into Puget Sound so long as they are attended by a tug escort (if between 40,000 and 125,000 dwt).

Second, Chapter 125's double bottom option is consistent with the Coast Guard's own regulations. The Coast Guard has expressly said that the use of double bottoms is one of six ways for a tanker to comply with the Coast Guard's segregated ballast requirement.[9] Chapter 125's optional double bottom require-

[8]The Coast Guard has published an Advance Notice of proposed Rulemaking, 41 Fed. Reg. 18770 (May 6, 1976) indicating that it is considering adoption of tug escort requirements.

[9]40 Fed. Reg. 48289, 48290 (October 14, 1975). The Coast Guard's segregated ballast requirement was adopted, essentially unchanged from its proposed form, in 41 Fed. Reg. 1479 (January 8, 1976).

ment is also consistent with the Secretary of Interior's commitment to Congress that oil tankers serving the marine transport leg of the Trans-Alaska Pipeline would incorporate double bottoms.[10]

States still have the power to encourage higher vessel standards for the unique needs of their marine environments. Certainly, it cannot be said that Congress, in the PWSA, has preempted the field of voluntary cooperation by shipbuilders to construct ships with double bottoms, greater shaft horsepower and other improvements not presently required by Coast Guard design regulations. While no tankers exist which meet the option design and equipment standards in Chapter 125 (Pretrial Order ¶ 75), a number of existing tankers and tankers under construction have or will have many of the safety features in Chapter 125 and have or will have higher design standards than the Coast Guard's minimum requirements under PWSA.[11] Clearly, a trend is underway toward the construction of

[10]In testimony before the Joint Economic Committee on Natural Gas Regulation and the Trans-Alaska Pipeline, June 22, 1972, Secretary Rogers C. B. Morton explicitly stated:

> "Newly constructed American flag vessels carrying oil from Port Valdez to United States ports will be required to have segregated ballast systems, incorporating a double bottom, which will avoid the necessity for discharging oily ballast to the onshore treatment facility."

See also letter of Secretary of the Interior Rogers Morton on S. 1081 to all members of the Senate, April 6, 1973, 1973 U.S. Code Cong. & Admin. News 2509, 93rd Cong. 1st Sess. ". . . we are insisting that operation of the maritime leg [of the Trans-Alaska Pipeline] be safer than any other oil transportation system now in operation."

[11]Pretrial Order ¶ 63. More than 20 double bottom tankers are on order or under construction in the United States. *Hearings Before the Subcommittee on Coast Guard and Navigation of the House Committee on Merchant Marine and Fisheries*, 93rd Cong. 1st Sess. 247-252 (Serial No. 93-16, June 6, 7, and July 18, 19, 1973).

oil tankers having the kinds of optional design and equipment features in Chapter 125. Chapter 125 encourages and anticipates this trend and clearly does not frustrate any federal policies or purposes in the area of oil tanker design and equipment.

A careful analysis and comparison of Chapter 125's requirements and existing Coast Guard regulations over oil tanker operations demonstrates that it is physically possible for oil tankers to comply with both the state and federal schemes. The record supports the conclusion that oil tankers operating in Puget Sound have complied with both Chapter 125 and the Coast Guard regulations without encountering federal or state enforcement actions and without making it impossible, let alone unduly burdensome, to engage in interstate commerce. Pretrial Order ¶¶ 13, 77, 78, 79. There are thus no conflicts, as defined by this Court in *Florida Avocado Growers v. Paul*, 373 U.S. 132, 143 (1963), between Chapter 125 and federal law.

E. The Coastal Zone Management Act, Federal Water Pollution Control Act and Deepwater Port Act Provide for Coordinated State and Federal Actions to Prevent Oil Spills in Coastal Waters

> "Where coordinate state and federal efforts exist within a complementary framework, and in the pursuit of common purposes, the case for federal preemption becomes a less persuasive one." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

That the PWSA does not purport to provide the exclusive remedy to the problem of reducing oil spills in state coastal marine environments like Puget Sound can also be demonstrated by examining related federal

legislation in the field, which expressly gives the states a responsibility and a role in protecting water quality, planning tanker facilities and protecting shoreline environmental quality.

The Water Quality Improvement Act of 1970, now a part of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1321, *et seq.*, provides:

> "Nothing in this section shall be construed as preempting any state or political subdivision thereof from *imposing any requirement* or liability with respect to the discharge of oil or hazardous substance into any waters within such State." 33 U.S.C. § 1321(o)(2). (Emphasis added.)

The role and responsibility of the states in cooperating with the federal government to prevent and eliminate oil pollution in state coastal waters is underscored in the Congressional declaration of goals and policy in the Federal Water Pollution Control Act:

> "It is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights of States to prevent, reduce and eliminate pollution*, to plan the development and use (including restoration, preservation and enhancement) of land and water resources, and to consult with the [EPA] Administrator in the exercise of his authority under this chapter. . . ." 33 U.S.C. § 1251(b). (Emphasis added.)

The Congressional policies in the Federal Water Pollution Control Act clearly indicate that *both* the states and the federal government are to work cooperatively to prevent, reduce and eliminate oil pollution in coastal waters.

The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*, provides another illustration of this point. Congressional findings include:

> "(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate; and
>
> (h) The key to more effective protection and use of the land and water resources of the coastal zone *is to encourage the states to exercise their full authority over the lands and waters in the coastal zone* by assisting the state, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone . . ." 16 U.S.C. § 1415(g)(h). (Emphasis added.)
>
> "The Congress finds and declares that it is the national policy . . . (b) to encourage and assist the States to exercise effectively their responsibilities in the coastal zone . . ." 16 U.S.C. § 1452.

The Coastal Zone Management Act provides federal funding to states toward the development of comprehensive coastal zone management programs or plans. 16 U.S.C. § 1454. Washington state laws aimed at preventing and eliminating water pollution, including Chapter 125, are integral parts of the Washington Coastal Zone Management Plan. Once completed, a state coastal zone plan is submitted to the Secretary of Commerce for approval and, if approved, federal agencies conducting or supporting activities in the coastal zone "shall

conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. §§ 1454-1455; 1456(c)(1). Pursuant to this law, the State of Washington has submitted and received federal approval of its coastal zone management plan.

Related to the Coastal Zone Management Act is the Estuarine Areas Act of 1968, 16 U.S.C. § 1221 *et seq*. This Act provides:

> ". . . it is declared to be the policy of Congress to recognize, preserve, and protect *the responsibilities of the States in protecting, conserving, and restoring the estuaries* of the United States." 16 U.S.C. § 1221. (Emphasis added.)

Puget Sound is an estuary. Pretrial Order ¶ 81.

The Costal Zone Management and Estuarine Areas Acts make it clear that states have the primary responsibility to use the full range of their historic police powers and other powers to protect estuarine areas like Puget Sound from oil spills. The Congress plainly could not have assigned to the states these powers and responsibilities to protect water quality in bays and estuaries like Puget Sound and, at the same time, have intended that the states are completely ousted from the field of regulating tanker operations in bays and estuaries to protect marine environmental quality.

The Deepwater Port Act of 1974, 33 U.S.C. § 1501, *et seq.*, is also relevant. This law provides a comprehensive scheme for regulating the location, ownership, construction and operation of deepwater ports in waters beyond the territorial limits of the United States and to

"(2) provide for the protection of the marine and coastal environment to prevent or minimize any adverse impact which might occur as a consequence of the development of such ports; and

* * *

(4) protect the rights and responsibilities of States and communities to regulate growth, determine land use, and otherwise protect the environment in accordance with law." 33 U.S.C. § 1501 (a)(3).

The Deepwater Port Act expressly gives the states a veto power over proposed deepwater ports located *outside* the three-mile limit of state coastal waters. 33 U.S.C. § 1508(b)(1). Congressional action giving state authority to veto deepwater ports proposed for location *outside* state waters clearly indicates that states are not to be denied similar authority with respect to deepwater ports proposed for location *inside* the three-mile limit, particularly where it is reasonable to anticipate that greater environmental damage would occur from tanker related oil spills. Senate Report No. 93-1217, 92d Cong. 2d Sess., 1974 U.S. Code Cong. & Admin. News, p. 7538.

In providing a comprehensive scheme for locating deepwater ports for supertankers outside the three-mile limit, Congress recognized that in this era of increasingly larger supertankers a new kind of port facility was required and that larger supertankers should be kept out of crowded bays, estuaries and ports by encouraging a safer alternative—the deepwater port. Senate Report No. 93-1217, *supra*, p. 7614. In this respect, the Deepwater Port Act shows both 1) that Chapter 125's 125,000 dwt size limit for supertankers in Puget Sound

is consistent with federal policy, and 2) that Congress intended the states to play a major role in regulating potential sources of oil spills in state coastal waters.

These recent federal environmental laws underscore an overall Congressional policy and intent to give states the opportunity to regulate marine environmental quality *cooperatively* with federal agencies, and to uphold state regulatory efforts unless they clearly are in conflict with or obstruct federal purposes and laws.

II
Chapter 125 Does Not Violate the Interstate Commerce Clause

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. * * * *If a legitimate local purpose is found, then the question becomes one of degree.* And the extent of the burden that will be tolerated will of course *depend on the nature of the local interest involved,* and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). (Emphasis added.)

This case does not involve tenuous state interests such as the state's concern over a specified shape of truck mudguards in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 525 (1959).

The State of Washington has a legitimate public interest in regulating tanker traffic in Puget Sound.

The uncontested facts in this case show that Puget Sound is a unique estuary of great ecological, aesthetic and economic value to the people of Washington as well as to the nation. Pretrial Order ¶¶ 81, 83, 85-92, 94-98, 100-106. Puget Sound is also unique in terms of its physical, meteorological, navigational and ecological carrying capacity. Pretrial Order ¶¶ 82, 84, 108. Estuaries like Puget Sound are altogether different from open sea coastal waters or the high seas in that an estuary's physical, navigational and ecological carrying capacity cannot be protected with the same uniform regulatory measures applied to open sea waters or even other estuaries. Each estuary poses unique circumstances requiring tailor-made regulatory measures. It is therefore worth emphasizing that the subject of estuarine environmental quality neither requires nor is capable of uniform regulatory treatment. *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299 (1851).

The State of Washington clearly may utilize its police powers over shoreline facilities such as tanker terminals as a traditional exercise of police power over land use—limited only by the requirements that the land use control not be arbitrary or irrational, nor impose an undue burden on interstate commerce, and that it be enacted for a proper public purpose. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Huron Portland Cement v. Detroit,* 362 U.S. 440, 442 (1960) [protection of public health through preservation of environmental quality is a valid and indeed primary objective of the police power]; *Askew v. American Waterways Operators,* 411 U.S. 325, 343 (1973) [sea to shore pollution is historically within the reach of the police powers of the states]. *Construction Industry Assoc. of Sonoma County v. City of Petaluma,* 522 F.2d 897 (1975), cert. den. 424 U.S. 934 (1976). As previously pointed out, federal legislation in the area of estuarine and coastal zone environmental protection makes clear that the states have primary responsibilities and powers in this area, particularly with respect to onshore facilities that may impact on water quality.[12] Thus, the State of Washington could legitimately regulate oil tanker facilities in Puget Sound e.g., by limiting the size of tanker facilities, refineries and oil storage tanks in order to insure that very large tankers not utilize Puget Sound (assuming again that this would not impose an undue burden on interstate commerce). Chapter 125's tanker size limit in reality is a direct method of doing what the State of Washington could do indirectly through its shoreline management police powers. In this respect, Chapter 125's tanker size limit is equivalent to an exercise of the State's zoning power.

The question remains whether this kind of limitation on supertankers above 125,000 dwt constitutes an "undue" burden on interstate commerce. It bears emphasizing that Chapter 125 by its terms does not prevent supertankers above 125,000 dwt from entering Washington's coastal waters or port facilities elsewhere. The Pretrial Order, ¶ 26, brings out the fact that the Northern Tier Pipeline Company has announced plans to construct an oil transfer terminal at Port Angeles,

---

[12]In the Senate Report on the Deepwater Ports Act of 1972, the Committee, speaking about the state role, said:

> "States clearly have regulatory control over construction of onshore port-related facilities. And under the Submerged Lands Act and pursuant to the U.S. Constitution (10th Amendment), the States have either exclusive or concurrent authority with the Federal Government over most activities within the 3-mile limit." *Senate Report* No. 93-1217, supra, 7538.

Washington [not covered by Chapter 125] capable of receiving tankers in excess of 125,000 dwt. The Port Angeles terminal would connect, via a submarine pipeline of approximately 1.5 miles, with a pipeline to be constructed around Puget Sound, east across the State of Washington and to refineries in the midwest. Pretrial Order ¶ 26. The Pretrial Order ¶ 107 also brings out the fact that there are at least three potential sites outside Puget Sound, in Washington State, capable of receiving tankers in excess of 125,000 dwt. Chapter 125 clearly is not a law that prohibits all entry of supertankers over 125,000 dwt into Washington State. Although the tanker size limit in Puget Sound may well make transportaton of crude oil to ARCO's Cherry Point refinery and other refineries located in Puget Sound more expensive, such additional expense is not excessive. Pretrial Order ¶ 68. More important, since Chapter 125 became effective in September 1975, all six oil companies operating refineries in Puget Sound have used tankers of less than 125,000 dwt (although prior to Chapter 125, 15 tankers larger than 125,000 dwt were received at ARCO's Cherry Point refinery; Pretrial Order ¶ 18), and yet "to the present time, *no reduction in the amount of oil processed at Puget Sound refineries has occurred as a result of the enactment of HB 527* [Ch. 125]." Pretrial Order ¶ 79. (Emphasis added.)

Thus, while the tanker size limitation for Puget Sound may result in some increase in the cost of oil transportation to Puget Sound refineries, it has not caused a reduction in commerce. The increase in cost, however, must be weighed against the important ecological, aesthetic and economic values accruing to

both Washington and the nation in insuring that massive oil spills from large supertankers do not occur in Puget Sound.

Chapter 125's tug escort requirement also does not impose an undue burden on interstate commerce. The average cost for tug escorts for tankers calling at ARCO's Cherry Point refinery has been approximately $7,500.00, which translates into $ .116 per barrel for a tanker of 90,000 dwt and $ .0087 per barrel for a tanker of 120,000 dwt. Pretrial Or... ¯8. These are very minimal cost increases and are clearly proportional to the important oil spill preventative service provided by the tug escorts. *See, Evansville-Vandenburg Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972) (upholding 'enplaning' tax where the revenue derived did not exceed the cost of running the airport). Both the tanker size limit and the tug escort requirements for Puget Sound are more like the South Carolina statute in *South Carolina Hwy. Dept. v. Barnwell Bros.*, 302 U.S. 177 (1938), which prohibited the use on state highways of semi-trailer trucks wider than 90 inches or heavier, including load, than 20,000 lbs. Even though the federal trial court had found that interstate trucking had become a national industry and that a very large proportion of trucks in interstate commerce were 96 inches wide and weighed, when loaded, more than 20,000 lbs., the Supreme Court unanimously upheld the validity of the State statute against a claim that it infringed on interstate commerce:

> "With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, *regulations of the use of the highways are*

akin to local regulation of rivers, harbors, piers and docks, quarantine regulation, and game laws, *which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.*" *Barnwell, supra,* 187-188. (Emphasis added.)

Chapter 125 also clearly has none of the badges or effects of economic discrimination which have invalidated state regulations which only slightly burden interstate commerce. Local tanker business or commerce is not particularly benefited by Chapter 125. Chapter 125 is plainly aimed at protecting environmental quality in Puget Sound, not at promoting local business interests at the expense of outside interests. Nor does Chapter 125 present the potential for conflicting requirements among the states such as the curved mudguards required by a state in *Bibb v. Navajo Freight Lines,* 359 U.S. 520 (1959). Puget Sound is not a highway or railroad traversing many states. Because the tanker size limit is rationally related to protecting the environmental integrity of Puget Sound, this regulatory limitation is conceptually no different from physical limitations that prevent supertankers from entering shallow estuaries. Each bay or estuary is unique in this respect. The optional design and safety equipment requirements in Chapter 125 could operate as potentially conflicting regulations *if they were mandatory*. But these requirements are optional, not mandatory. The tug escort requirement is also not the kind of local requirement held invalid in *Bibb* simply because it does not require any alterations or changes to tankers.

In summary, Chapter 125's tanker size limit and tug escort requirements do not constitute undue burdens

on interstate commerce. Chapter 125 is rationally aimed at protecting marine environmental quality in Puget Sound. The burdens and costs imposed on tanker oil transportation into Puget Sound by Chapter 125 are modest when balanced against the extraordinary dangers to public health and to Puget Sound's environment that Chapter 125 seeks to avert.

In recent years, many state and federal courts have not hesitated to sustain state legislation aimed at protecting environmental quality and natural resources against attacks based on alleged violations of the Commerce Clause. *American Can Co. v. Oregon Liquor Control Comm.,* 15 Ore. App. 618, 517 P.2d 691 (1973) [ban on non-returnable beverage containers]; *Proctor & Gamble Co. v. City of Chicago,* 509 F.2d 69 (7th Cir. 1974), cert. den. 421 U.S. 978 (1975) [ban on phosphate detergents]; *Portland Pipe Line Corp. v. Environmental Improvement Comm.,* 307 A.2d 1 (1973), appeal dismissed 414 U.S. 1035 (1973) [prevention and control of marine oil spillage]; *Construction Ind. Assoc. v. Petaluma,* 522 F.2d 897 (9th Cir. 1975), cert. den. 424 U.S. 934 (1976) [limitation on building below prevailing market demand]. This Court should also sustain this state environmental quality legislation.

Conclusion

Where, as in this case, Congress has not clearly indicated its intent, and where the federal statute does not by its terms completely cover the field, a ruling that the states are preempted will create a gap in much needed regulation of oil tanker operations, leaving the states powerless to fill it. Permitting the states to regulate in the gaps, where no actual conflicts with

federal regulation occur, still allows Congress the option of acting legislatively to preempt all state action. Permitting the states to regulate also encourages experimentation in diverse ways to solve the complex economic, social and environmental problems presented by the massive transportation and processing of oil in the coastal states. Permitting state regulation will promote federalism and will not frustate national policies.

It is difficult to see how the concurrent exercise of federal and state powers in this case must necessarily and inevitably lead to conflicts or frustration of federal purposes. See, *Goldstein v. California,* 412 U.S. 546, 549 (1973). The problem of preventing and minimizing tanker oil spills in unique coastal marine environments will not be made more difficult by the tanker size limitation in Chapter 125. The problem will not be made more difficult by the tug escort requirement for tankers in the 40,000-125,000 dwt range. The problem will not be made more difficult by the State's setting out optional safety and design features which will hopefully encourage shipbuilders to construct better and safer tankers than the Coast Guard currently requires. It is incongruous to promote a given end on the one hand and at the same time prevent states from undertaking supplementary efforts toward the very same end. See, *New York State Department, etc. v. Dublino,* 413 U.S. 405, 419-420 (1973). Carefully analyzed, it is evident that Chapter 125's size limits and tug escort requirement are supplementary to the federal objective and present no actual conflicts with federal purposes or law. Where, as here, Congress has not indicated clearly any intent to provide an exclusive remedy to the problem of tanker oil spills,

and where coordinate state and federal efforts exist within a complementary framework, and where both have the same objectives, the case for federal preemption is weak. *Marshall v. Consumers Power Co.,* 237 N.W. 2d 266, 282 (1976); *New York State Dept., etc. v. Dublino,* 413 U.S. 405, 421 (1973); *FPC v. Panhandle Eastern Pipe Line Co.,* 337 U.S. 498, 512-513 (1949). As in *Askew v. American Waterways Operators, supra,* and as in *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960), this Court should uphold Chapter 125.

Dated: May 13th, 1977.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General,
E. CLEMENT SHUTE, JR.,
Assistant Attorney General,
C. FOSTER KNIGHT,
Deputy Attorney General,
Attorneys for Amicus Curiae
State of California.